IN THE

Supreme Court of the United States

October Term, 1944

No. 148

Webre Steib Company, Ltd., *Petitioner*,

v.

Commissioner of Internal Revenue, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE.

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Press of Byron S. Adams, Washington, D. C.

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PETITION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

The undersigned respectfully petition this Court for leave to file the subjoined brief as amici curiae. The Solicitor General and counsel for petitioner have consented in writing as indicated by letters filed with the Clerk of the Court.

Richard B. Barker
John C. Reid
Southern Building
Washington, D. C.

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BRIEF AMICI CURIAE.

INTRODUCTORY STATEMENT.

The Circuit Court of Appeals properly stated that "The crucial question presented is whether the taxpayer * * * established that it bore, in whole or in part, the ultimate economic burden of the tax paid." The Court, however, indicated its confusion as to the *nature* of this question by relying on a certain type of evidence as dissolving the statutory presumption created by Section 907 of the Revenue Act of 1936. The type of evidence to which we refer may be characterized as "Subjective Evidence," since it was evidence of what the parties to transactions *thought* or *said* on the subject of tax shifting or the inclusion of tax in the selling price, or the collection of the tax from vendees. We undertake in this brief to show that the evidence of that kind relied on by the court below was not *substantial* evidence such as would dissolve the presumption.

We have no quarrel with the lower court's holding "That the statutory presumption, when rebutted, disappears entirely from the case." We agree that when any real, substantial evidence is introduced which tends to show the extent to which the tax was shifted or borne by the taxpayer, the presumption itself is dissolved and cannot be weighed as evidence against evidence. We agree with the petitioner that after a presumption is thus rebutted the basic facts on which it operated, i. e., the margin figures for the tax period and the period before and after the tax, remain in the case as evidence, for what they are worth as evidence but without any *artificial* force.

If the presumption had been dissolved here, the margin figures for various periods put in evidence by petitioner may or may not be sufficient by themselves to justify a finding that petitioner bore some part of the tax burden. This is a complex and difficult question of economic fact with which we are not concerned in this brief.

We are, however, very much concerned with the question as to the evidentiary weight to be given to "subjective evidence." And so are many processors whose cases are now before the Bureau of Internal Revenue and the lower courts. In holding that the presumption had been rebutted, the court below relied entirely on findings by the Processing Tax Board of Review that the price of sugar increased by the amount of the tax on the date of its imposition, that in the accounts stated between petitioner and its broker the processing tax was shown as a separate item, and that in a letter dated January 17, 1936 to petitioner from its broker the latter stated that the processing tax had been included in the price of petitioner's sugar and that,

> "Therefore you have not paid any more tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago or [are] really tax free."

The Board had ignored these findings and determined on the basis of marginal evidence that the claimant was entitled

to a partial refund. The court below, however, ignored the marginal evidence and denied petitioner's claim in its entirety *solely* on the basis of these findings, stating,

> "Upon evidence before it the Board found that the claimant had participated in a universal increase in the selling price of sugar, effective as of the moment the processing tax was imposed, to cover the amount of the tax; and that claimant had collected from its vendees all taxes, for the entire period of the tax, assessed upon the processing of molasses, and all taxes for processing sugar during the year 1935. These findings are not attacked. Moreover, there was no showing that this policy of shifting the burden of the tax, thus shown to exist at the beginning and end of the tax period, did not continue throughout the effective period of the taxing statute. This evidence clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

It is barely possible that the actual decision of the Circuit Court was correct because of the state of the record in this particular case. But the language used by the Court and set out above indicates a lack of understanding of the fundamental principles involved in a determination of tax incidence. The purpose of this brief, therefore, is to urge the Court, whatever its actual decision, to correct the erroneous theory of the court below and enunciate the proper principles for the determination of tax incidence.

ARGUMENT.

(1) The Test for Determining Tax Incidence.

In placing upon the courts the duty of determining the extent to which a processor shifted the burden of the processing tax, Congress gave the courts one of the most difficult jobs ever to be thrust upon them. The Senate Finance Committee recognized this in enacting Title VII of the Revenue Act of 1936 when it said (S. Rep. No. 2156, 74th Congress, 2nd Session)

"* * * the question as to whether processing taxes were passed * * * involves extremely complicated economic and accounting considerations."[1]

A reasonably intelligent solution of this problem is difficult at best, but it is utterly impossible unless the nature of the problem is understood. It is absolutely necessary to know, and keep constantly in mind, the basic test for determining the extent to which the burden of a tax is shifted or borne by the one who pays it. The universally accepted test may be expressed in many ways but it always involves a comparison of the taxpayer's actual economic position during the tax period with a reasonable estimate of what the taxpayer's economic position would have been in the absence of the tax but with all other factors as they were. There is always involved a comparison of what actually happened with what would have happened without the tax. Stated in terms of prices, the tax burden borne is measured by a comparison of the prices which actually prevailed during the tax period with what such prices would have been without the tax. Stated in terms of margins, the tax burden borne is measured by a comparison of the margins which actually prevailed during the tax period with what such margins would have been in the absence of the tax. Stated in terms of net profits, the test is the extent to which net profits were lower in the tax period than they would have been in the absence of the tax. The same idea is present when the subject of the tax burden borne is discussed in terms of injury to the processor. A processor has been injured by the tax, and therefore has borne some part of the burden of the tax, if his net economic situation during the tax period was worse than it would have been in the absence of the tax. But, however it is stated, any determination of tax incidence involves a comparison of the prices, margins, or profits *actually obtained* with an intelligent esti-

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[1]See Appendix for the views of economists on some of these complicated economic considerations.

mate of the prices, margins, or profits *which would have been obtained* in the absence of the tax.

The test enunciated above is not only universally accepted by economists, but it has also been adopted by the Government in relation to cases under Title VII of the Revenue Act of 1936. In a publication entitled "An Analysis of the Effects of the Processing Tax Levied Under the A.A.A." prepared by the Bureau of Agricultural Economics and published by the Bureau of Internal Revenue, it is stated (p. 4):

> "Any analysis of tax incidence is based fundamentally upon an appraisal of what prices and margins *would have been* in the absence of the tax." (Emphasis supplied.)

The same view is set out in greater detail in an article written, apparently with official sanction, by Wirth F. Ferger, an economist in the Department of Agriculture, and published in the March 1937 issue of the American Economic Review. In that article Dr. Ferger states:

> "It is recognized that the *proof of the incidence of a tax is a matter of economic and statistical inference rather than of simple and easily ascertained fact.* * * *
>
> "Our problem of inference consists in comparing the prices received and the prices paid by a processor at the time he was paying the processing tax, with what those prices *would have been at that time* in the absence of the tax but with all other conditions as they were. The inferential nature of the problem is obvious, since 'what would have been' is an inference rather than a simple objective fact. * * *" (Emphasis supplied.)

It is important to note, moreover, that the then Secretary of Agriculture Wallace adopted this same concept in explaining Title VII of the 1936 Act to the Senate Finance Committee. He said:

"Accordingly, if the processor shifted the burden of the tax, either by increasing his selling price down [above?], or by reducing his buying price below, *what it otherwise would have been*, this would be evidenced by an increase in his gross operating margin retained during the tax period." (Emphasis supplied.)

In *Arkwright Mills* v. *Commissioner*, 127 F.(2d) 465, the Court stated,

"We understand the Board to hold that the evidence as to change in demand in the periods chosen by Congress for comparison should be ignored because the evidence represents merely an attempt to show what the taxpayer's margin would have been during the tax period if there had been no tax; and because this effort involves the setting up of a hypothetical or imaginary situation which has no tendency to prove the actual extent to which the taxpayer bore the burden of the tax. This point of view in our opinion cannot be maintained. In the first place it is manifest that the statutory test, which Congress itself devised, *involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax.* * * *" (Emphasis supplied.)

(2) "Subjective" Evidence.

Having set forth the basic test for determining the extent to which the burden of a tax is shifted or borne, let us apply that test to the facts upon which the Circuit Court relied in the present case.

(a) *Initial Price Increase.*

The Board found that the taxpayer participated in a general price increase in the amount of the tax on the date the tax was first imposed. This price increase, of course, involves something more than the "subjective" evidence with which this brief is principally concerned. An actual rise in prices is an objective economic fact. It would be possible to infer in the absence of explanation that the price *imme-*

diately after the increase was greater by the amount of the tax than it would have been in the absence of the tax. But the tax was in effect for two years, and the price changed constantly after the imposition of the tax. Also the record shows that the claimant actually realized a lower price per ton on the 1934 crop than on either the 1935 crop or the 1933 crop.[2] It is reasonable to assume, merely because of an initial price increase in the amount of the tax, that during the *entire* tax period the processor was not injured by the tax?

Normally, an arbitrary price increase encounters resistance from buyers, thus forcing the sellers to reduce the price at least to some extent. And to buyers, a price increase is a price increase, no matter what reason the seller gives for making it. Prices change for a great variety of reasons, but principally by reason of the operation of the law of supply and demand. Is it reasonable to suppose that, once a processor has increased his price by the amount of the tax, all subsequent price changes are irrelevant to the question of tax incidence and from then on his prices are greater by the amount of the tax than they would have been in the absence of the tax? Such an assumption would, of course, be an absurd over-simplification of a complicated problem in economics.[3]

There was another factor in this situation of which the Court can take judicial notice and which is of crucial importance in understanding this initial price increase. A floor stock tax was imposed on all commodities held for sale on the date of the imposition of the processing tax. Consequently, when a wholesaler or converter purchased a ton of sugar from a processor during the period immediately

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[2] In the present case, moreover, the petitioner had no sugar to sell and was not in the market until several months after the imposition of the tax.

[3] See Appendix for statements by various economists as to the difficult problems involved in determining tax incidence.

preceding the imposition of the tax, he purchased it knowing he would have to pay a floor stock tax on it before he could get rid of it. He purchased not only a ton of sugar but also a tax liability. The "real" price of the sugar to the purchaser immediately prior to the imposition of the tax was the amount paid to the processor plus the amount of floor stock tax payable on that sugar. Immediately after the imposition of the processing tax the "real" price was the amount paid to the processor. In this situation, a price increase in the exact amount of the tax on the date of the imposition of the tax was automatic and inevitable. Under these particular circumstances such an increase does not prove anything at all about the tax burden borne by the processor. It was merely a technical price adjustment having no effect on the real economic price of the sugar. In this respect it was somewhat comparable, although in reverse, to the situation in which a stock is sold on the stock exchange "dividend on" or "ex-dividend". One day a stock sells for $105 per share, "dividend on", while the next day it sells for $100 per share "ex-dividend", yet the real price of the stock remains the same. It makes no difference to a purchaser whether he pays $105 for a share of stock and receives immediately a dividend of $5 or whether he pays $100 without getting a dividend for another year.

That the initial price increase in processing tax cases was merely technical, and meaningless for purposes of the present inquiry, can best be shown by example. In the cotton industry the processing tax went into effect on August 1, 1933, and a floor stock tax was imposed on all cotton goods held for sale on that date. Let us assume the case of a cotton processor who shifted the entire burden of all processing taxes paid by him. On July 31, 1933, he sold his product for 20c per pound. On August 1, 1933, *with exactly the same market conditions* except for a tax of 4c per pound, he sold his product for 24c a pound. Yet because of the floor stock tax, his vendee paid exactly the same amount for the product on both days. In the case of

the goods purchased on July 31, 1933, he paid 20c to the processor and 4c to the Treasury Department, and in the case of the goods purchased on August 1, 1933, he paid the entire 24c to the processor. Consequently, the price increase by the processor on August 1, 1933 was meaningless in any consideration of the actual economic price of the goods. It was purely a paper increase.

Now let us assume the case of a processor who bore the entire burden of all processing taxes paid by him. The market would absorb his product at a price of 20c a pound but was such that he could not obtain a higher price. During the period immediately preceding August 1, 1933, his vendees were willing to pay 20c a pound for his product, but were not willing to pay 20c to him and another 4c to the Treasury Department. Consequently, the processor's price was gradually depressed to 16c a pound on July 31, 1933,[4] although the real price to his vendees was 20c because of the floor stock tax payable by them. On August 1, 1933, *with no change in market conditions*, the processor's price was increased to 20c a pound which, as far as the vendee was concerned, was the real economic price all along. In this situation, the price received by the processor before the imposition of the tax was less by the amount of the tax than it would have been in the absence of the tax. After the imposition of the tax the processor's price in our example was exactly the same as it would have been in the absence

[4]Actual figures during July and August should not be compared with this hypothetical example. The example assumes that all other marketing factors, except the tax, remained unchanged. Actually, cotton textile prices increased from July 17, 1933, when N.R.A. became effective, to July 31, 1933. Thus, actual prices may have risen from 15c to 20c between those dates; but, on our assumption, if there had been no tax the price would have gone to 24c on July 31, 1933. The price was therefore lower than what it otherwise would have been if there had been no tax, by 4c, because the processor absorbed the burden of the floor stock tax payable by his vendee after August 1, 1933.

of the tax. The processor therefore not only bore the burden of the tax paid by him but also the burden of the floor stock tax paid by his vendee.

The purpose of these examples is not to prove any specific facts about the burden borne by processors[5] but to show that, in view of the floor stock tax, the fact of an initial increase in processors' prices is meaningless in relation to the problem of determining the actual economic incidence of the processing tax. As shown by the above examples, the fact of an initial price increase is consistent either with complete tax shift or with complete tax absorption by the processor. It is also consistent with partial tax absorption by the processor. Consequently, merely as a matter of logic and common sense no weight can be given to the mere fact of an increase in processors' prices on the date of the imposition of the processing tax. Such increases were technical market adjustments necessitated by the presence of the floor stock tax. When the Circuit Court in the present case laid such great emphasis on the initial price increase in the claimant's industry, it demonstrated a complete failure to understand the relation between the processing tax and the floor stock tax. This lack of understanding resulted in attributing great significance to a fact which had no significance whatsoever. A fact which is equally consistent with the argument on either side of a case cannot have evidentiary weight.

(b) *Tax Billed as a Separate Item.*

The Board found, as stated above, that in the accounts stated between the claimant and its broker with respect to sales of molasses the tax was shown as a separate item.

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[5]It is interesting to note, however, that the price of sugar was depressed during the period immediately prior to the imposition of the processing tax, indicating that the processors were bearing some part of the burden of the floor stock taxes payable as of June 8, 1934 by their vendees.

From the record it appears that this billing method existed only between the claimant and its broker, and did not extend to claimant's vendees. In the final analysis, however, it would make no difference, so it will be assumed purely for the sake of argument that the customer paid for his purchases upon the basis of invoices showing the tax as a separate item. The Board also found that claimant's broker had written claimant a letter stating that "you have not paid any more tax than you collected and these sugars in warehouses * * * [are] really tax free." Upon the basis of these findings the Circuit Court decided that "claimant had collected from its vendees all taxes, for the entire period of the tax. * * * Moreover, there was no showing that this *policy* of shifting the burden of the tax * * * did not continue throughout the effective period of the taxing statute."

It is submitted that these findings of the Board have little or no relevance in the present inquiry and that the Court's emphasis on them indicates an erroneous view as to the basic principles involved in the case. The key to the Court's confusion is contained in its use of the word "policy" in its statement that claimant pursued a "policy" of shifting the tax burden. Of what conceivable assistance, in a complicated economic inquiry such as is involved in the present case, is a finding from which it can be inferred that claimant had a "policy" of shifting the tax burden? Of course, claimant *tried* to shift the tax burden. All processor did. All processors hoped they were succeeding. And many processors *thought* they were shifting some or all of the tax burden. Undoubtedly almost all purchasers thought the tax was being shifted to them. But this evidence as to the state of mind of processors and their customers has very little bearing on the question of what actually happened. To determine what actually happened requires a painstaking inquiry by experts into a difficult problem in economics.

To illustrate the absurdity of this subjective approach, let us assume two processors, "A" and "B", who manufactured the same articles, sold in the same market, and

paid the same processing tax. "A" sold his articles under invoices stating "price 20c, tax 4c." "B" sold his articles for a flat price of 24c, making no reference to the tax. Under the subjective approach "A" would be regarded as having shifted the entire burden of the tax while "B" would presumably be considered as having absorbed the tax. Yet obviously, as a matter of objective fact, both "A" and "B" shifted the tax burden to exactly the same extent. A price is a price no matter how it is set up on an invoice. The problem is to determine the extent to which the price obtained was greater than the price which would have been obtained in the absence of the tax.

That the Circuit Court was not cognizant of the test for determining tax incidence is further shown by its reliance on a letter to the claimant from its broker stating that claimant had collected all the tax he had paid. The Court appeared to believe that this was strong evidence that claimant had shifted the entire economic burden of the tax. Analysis shows that no such inference is justified. In the first place, it is clear from the broker's use of the words "tax free" in describing the sugar sold by claimant but still in a warehouse, that in his mind the important considerations were that the tax had been paid by claimant so that the sugar would be subject to no further tax and that claimant had received all he could ever receive for the sugar. In the second place, it is highly unlikely that the broker had any thoughts at all about the precise economic incidence of the tax. There was no reason at that time for him to have the problem in mind. Even if he had, his opinion on the subject would be entitled to no weight.

This same misconception as to the real issue has been adopted by respondent in other cases where on his invoice or sales contract the processor has stated a flat price and followed it with the notation "price includes tax." What did this notation mean? Actually, it meant no more than that the tax had been paid and that the vendee would not be subjected to tax. Respondent has frequently contended

that the phrase meant that the tax was a part of, or "buried in", the price and that therefore the entire burden of the tax had been shifted. This is a complete non-sequitur. The tax was a cost, and in the sense that all costs are represented to some extent in the price, the tax might be considered as having been "buried in the price." But stating this accomplishes nothing. The question is whether or to what extent the economic burden of the tax was shifted and this can only be determined by comparing prices received with what those prices would have been in the absence of the tax.

When examined, the whole argument in support of subjective evidence is an argument that, *whether or not* a processor *actually* bore any part of the burden of the tax, he is denied any recovery if he made representations to the effect that he shifted such burden. This argument avoids the real issue in controversy and seeks to have the case decided on some theory of an admission against interest or estoppel. A processing tax case is not a criminal prosecution, and theories such as these have no bearing on the problem.

It cannot be emphasized too strongly that the question involved is whether or not in actual fact, the prices actually received were such that the processing tax was passed on, or whether the prices were such that the burden of the processing tax remained at least in part on the processor. This is a question which cannot be answered by resort to a processor's conception of what he thought he was doing at the time the tax was in effect, or to what his broker or vendee thought was happening, but only after a painstaking analysis and comparison of the prices actually received by the processor for his goods and by an appraisal of other economic evidence. In this light, any statements, however articulate, as to what the processor thought he was doing or hoped to do, can obviously be given no real weight as against evidence of what such prices actually were, and how they compared with what prices would have been in the absence of the processing tax.

That it is the actual economic facts rather than the subjective trimmings which are important was recognized very clearly by the Circuit Court of Appeals for the Seventh Circuit in *Cudahy Packing Co.* v. *United States*, 126 F.(2d) 429. A floor stock tax was involved in that case rather than a processing tax but the same principles control. Moreover, the situation was the reverse of that in the present case since the Government was arguing that economic facts control over subjective evidence or the lack of it. The District Court entered judgment for the claimant for the entire amount of tax paid on the ground that the claimant had *not* billed the tax as a separate item, or "added or included in the prices of its products any identifiable amount of floor stock taxes." The Circuit Court reversed this decision, stating, (p. 431)

> "Although the phrase 'economic burden' is not used in the section, any other interpretation of the word burden would do violence to the language and purpose of the section. This conclusion is also sustained by Senate Report No. 2156 of the Committee on Finance, pp. 32-34, 74th Cong. 2nd Sess.
>
> "There is no doubt that the shifting of the burden in the economic sense requires more exhaustive and difficult proof than the legal test. The measure is not confined merely to acts of the taxpayer; it rests in the economic forces at play, forces over which the average individual has little, if any, control. One force, to be sure, may be the tax, but that makes no less real the other economic forces contributing to the resultant."

Perhaps the best statement with respect to the evidentiary value of subjective evidence in the face of actual economic facts is contained in the court's opinion in *Arkwright Mills* v. *United States*, 49 Fed. Supp. 970, aff'd (CCA-4) 139 F. (2d) 454. The court stated, (p. 972)

> "Defendant claimed to have evidence that plaintiff had shifted the burden of the tax in some correspondence in which its sales agent said that it was understood

that 'price includes tax.' Plaintiff produced evidence, explaining that this only meant that there would be no further billing for the tax, but this was really unnecessary, *for what was meant or said or understood is not the test of whether a tax burden is shifted.* C. B. Cones & Sons Mfg. Co. v. United States, 7 Cir., 123 F.(2d) 550. The test is the economic difference between what a seller would have realized if there had been no tax and what he did realize after becoming liable for the tax. Arkwright Mills v. Commissioner, 4 Cir., Dec. 18, 1941, 127 F.(2d) 465. * * *

"If any of the burden was shifted, it was by the collection from purchasers of an amount in excess of what the goods would have sold for if there had been no tax. The question is one of objective economic fact rather than one of subjective thoughts or statements relative to whether the tax burden is shifted or absorbed." (Emphasis supplied.)

The District Court in the above statement showed up the fallacy of subjective evidence with devastating effectiveness when it characterized the Government's claim as an argument that the plaintiff had shifted the tax "in some correspondence." If a tax can be shifted in correspondence, it is news to economists. One wonders whether the respondent would attribute such magic powers to correspondence in which a processor told his broker or customer that he was *absorbing* the entire burden of the tax.

(c) *Effect of Section 907(e)(2) of the Revenue Act of 1936.*

It is true that in Section 907(e)(2) of the Revenue Act of 1936, Congress indicated that evidence of the type characterized in this brief as subjective evidence would be proper rebuttal evidence. Consequently, by legislative fiat, such evidence was probably made relevant. But it still can be considered immaterial in that in most cases it has such a slight bearing on the real issue as to be of practically no value. Congress cannot make immaterial evidence material.

Facts exist independenly of any statutory suggestions as to the type of evidence usable to prove them. Moreover, it is specifically recognized in Section 907(e)(2) that the subjective evidence described therein may not indicate anything of importance. It is only *in the absence of explanation* by the claimant that such evidence is given weight.

It is also important to remember that in some cases the type of evidence described in Section 907(e)(2) has an important bearing on the question. Where the article manufactured by the processor is a standard price article, like a five cent cigar or a five cent package of chewing gum, it is important to examine the circumstances surrounding a price increase or a change in type or grade of the processed article. Usually in the case of a standard price article selling for the same price over a long period of time, a processor must make an actual decision as to whether or not or to what extent he is going to shift the tax burden. His decision may or may not have an important effect on the amount of tax burden he actually bears, but evidence with respect to such decision is certainly entitled to consideration. But this situation is far different from that of a processor who sells bulk goods at constantly fluctuating market prices over which he has no control. He sells for the highest possible price at all times and those prices are determined by the law of supply and demand. What he does or thinks about a particular item of cost like a processing tax has absolutely no effect on his prices. Whether his prices or margins are greater than they would have been in the absence of the tax is a question of market forces, elasticity of demand and other objective economic factors. The state of mind of any individual or group of individuals has nothing to do with it.

CONCLUSION.

It is extremely unlikely that any processor either bore the *entire* burden of the processing tax or shifted the *entire* burden. The economic principles involved make it almost inevitable that the correct answer in any case lies somewhere between complete shift on the one hand and complete absorption on the other. Yet the subjective approach adopted by the Circuit Court in its opinion in the present case permits of no middle ground. All questions of degree are prohibited. This approach ignores objective economic facts and denies relief to claimants on some theory of admission against interest or estoppel, regardless of their actual injury.

The purpose of this brief has been to expose the logical fallacy of reliance on what has been characterized as subjective evidence and to indicate the nature of the problem involved in processing tax cases. Whether this Court reverses or affirms the decision of the Circuit Court, it is hoped that the Court in its opinion will expose the fallacy of subjective evidence and set forth clearly and emphatically the basic legal and economic principles which must govern the solution of the very difficult problem involved in processing tax cases.

Respectfully submitted,

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November 25, 1944.

APPENDIX.

There are set out below quotations from various treatises showing the nature of the economic problem involved in any determination of tax incidence.

Achieving a Balanced Agriculture, published in August, 1934, by the Agricultural Adjustment Administration. (Page 35.)

"Who pays the processing tax depends on the supply and demand conditions for a given commodity.

"Demand for a product may be either elastic or inelastic. It is inelastic when about the same amount of the product is bought, no matter whether the price is high or low. It is elastic when a rise in price is immediately followed by a drop in quantity sold.

"When demand is inelastic, the processing tax is likely to be paid by the consumer, since he will continue to buy even if the whole tax is added to the price of the goods.

"When demand is elastic, on the other hand, the consumer may pay less than the full amount of the tax if the same quantity of the product is put upon the market as before. In such cases, the producer and the distributor each try to make the other absorb the tax."

Statement of Secretary Wallace, outlining economic bases for new sugar act and expected results. *Department of Agriculture Press Release*, March 15, 1937.

"Since in most instances the total cost of production (including duties and taxes) tends to be related to selling price, there is generally assumed to be a direct relationship between cost and price; but, in fact, the cost of production affects price only indirectly through its effect on supply. If the costs of production exceed price, there is a tendency for production to decrease, and the decreased supply causes an increase in prices. Thus, it will be noted that the quantity of the supply, and not the cost of production, is the direct casual factor in determining prices; and factors other than cost of production, in this case quotas, can supersede

cost of production in determining supply and, hence, in determining price."

A. G. Buehler, *Public Finance* (*New York*, McGraw Hill Book Co., 1936), pp. 237-239.

"Because prices are determined by neither supply nor demand alone, tax shifting depends not solely upon the wishes of the sellers, but also upon the actions of buyers. * * * The more inelastic the demand for taxed goods the easier to add the tax to prices, because the required readjustments in supply are relatively small. The more elastic the demand, the more difficult to shift taxes (since supply must be adjusted substantially. * * * In this economic world of risks and obstacles, tax shifting operates slowly and painfully by overcoming friction and resistance."

T. N. Carver, *Principles of National Economy* (Boston, Ginn & Co., 1921), p. 630.

"One of the first lessons that the student of taxation learns is that the payer of a tax sometimes shifts the burden in whole or in part on to someone else, thus relieving himself, in part at least, of the burden. This can come about only in the process of buying and selling. The person taxed, in other words, has no means of persuading anyone else, as a favor to himself, to assume the burden; he can only charge a higher price for what he has to sell, or pay a lower price for what he buys, thus recouping himself for what he has paid in the form of a tax. But this matter of raising the price of what one has to sell or depressing the price of what one has to buy is something which is not so easily done as said, as anyone can convince himself by trying it."

E. D. Fagan and R. W. Jastram, *Tax Shifting in the Short Run*, Quarterly Journal of Economics, August, 1939, Vol. LIII, No. 4, p. 568.

"In the short-run, price will always be increased by an amount less than the tax. * * * The less elastic the demand curve for the product of an industry, the more nearly will the tax increase in price be equal to the amount of the tax."

S. H. Slichter, *Modern Economic Society*, pp. 745-746.

"The fact that taxes can be shifted does not necessarily mean that they can be shifted at once. A decade or two may elapse before a tax which raises the cost of producing a commodity is completely shifted to consumers."

Jacob Viner, *Cost Curves and Supply Curves*, Zietschrift fur Nationalokonomie, Band III, Heft 1, p. 26.

"The 'short' run is taken to be a period which is long enough to permit of any desired change of output technologically possible without altering the scale of plant, but which is not long enough to permit of any adjustment of scale of plant."

Quarterly Journal of Economics, November, 1938, pp. 55-56, (article by J. K. Hall, discussing the validity of an assumption that demands for taxed commodities are so inelastic that new and higher prices may be easily fixed).

"To accept this hypothesis is to deny the existence of widespread rival supplies, the effectiveness of commodity substitution, and the dynamic character of consumer want-scales. It is to ignore a basic economic concept that no individual or composite consumer demand is fully inelastic. It is rudimentary that all demands are *relatively* elastic. * * * Lastly, this baseless assumption of volatile prices, adjustable by producers at will without supply diminution, is a complete contradiction of the observed operation of economic forces."

SUPREME COURT OF THE UNITED STATES.

No. 148.—October Term, 1944.

Webre Steib Company, Ltd., Petitioner, vs. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 12, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

This is a proceeding brought for recovery of sugar processing taxes paid under the Agricultural Adjustment Act of 1933. The Commissioner having denied in entirety the taxpayer's claim for $8,169.97, the total tax paid by it, taxpayer petitioned for review by the Processing Tax Board of Review, as provided by statute. 49 Stat. 1749. The Board awarded refund in the amount of $3,655.82, and motions for rehearing made by both parties were denied by the Tax Court, which had succeeded to the jurisdiction of the Processing Tax Board of Review. 56 Stat. 798. On appeal, the Court of Appeals for the Fifth Circuit reversed and held that the claim should be denied. 140 F. 2d 768. We took the case to review questions of application of the "prima facie evidence" and "presumption" sections of Title VII, Revenue Act of 1936, on which there was conflict in the circuits. *Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853, cert. granted, 320 U. S. 721, dismissed on motion of petitioner, 321 U. S. 800; *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713; cf. *E. Regensburg & Sons* v. *Helvering*, 130 F. 2d 507.

A new administrative procedure for recovery of taxes paid under the Agricultural Adjustment Act was provided by Title VII of the Revenue Act of 1936, §§ 901-917, 49 Stat. 1747, 7 U. S. C. §§ 644-59, repealing §§ 21(d), (e), and (g) of the 1935 amendments to the Agricultural Adjustment Act, 49 Stat. 771-73. The provisions were reviewed at length and their constitutionality upheld in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. In outline, so far as relevant to this case, they are as follows: The claimant is required to prove that he bore the burden of the tax. § 902. Average "margins" per unit of the commodity processed,

consisting of the difference between cost of the commodity (plus tax paid, if any) and gross sales value of the articles resulting from the processing, are to be computed for the tax period and a base period; the base period is the period two years preceding imposition of the tax and the six months thereafter (February to July, 1936). §§ 907(b), (c). If the margins for the tax period are lower than those for the base period, it is "prima facie evidence" that, to that extent, the claimant bore the burden of the tax; if they are not lower, it is "prima facie evidence" that none of the burden was borne by the claimant. § 907(a). But this "presumption" may be rebutted either by the claimant or by the Commissioner, by proof of "the actual extent" to which the claimant shifted the tax to others. Such proof may include, but is not limited to, certain types of evidence described by the statute. § 907(e).

For our purposes the material facts must be gleaned from the findings and memorandum of the Board of Review and a stipulation filed by the parties in the Court of Appeals.

Petitioner is a grower and purchaser of sugarcane, which it processes into direct-consumption sugar and edible molasses.[1] It operates during the months of October, November, and December of each year. The tax went into effect on June 8, 1934 and petitioner paid taxes until November 8, 1935, so that it paid processing taxes—$7,067.12 on sugar and $1,102.85 on molasses—for the months of October, November and December 1934 and October and November 1935. Its average statutory margin for this period was $.01192, and the total number of units processed was 2,256,676 pounds of sugar. Petitioner's base period consisted only of the two years prior to the tax because it did no processing in the six months February to July 1936. Its average statutory margin per unit for the base period was $.01354. Thus the margin during the tax period was $.00162 per unit lower than that during the base period, creating "prima facie evidence" that petitioner had borne the tax to the extent of $3,-655.82, the amount of refund allowed by the Board. Petitioner contends that this amount should have been increased by including in the margins its first processing after invalidation of the

[1] This processing was subjected to tax by the Act of May 9, 1934, c. 263, 48 Stat. 670, amending the Agricultural Adjustment Act. See especially § 9(d)(6)(A) and (B) of the Act as amended, 7 U. S. C. §§ 609(d)(6)(A), (B).

Agricultural Adjustment Act, which was its processing of the 1936 crop, October 1936 to January 1937. The average margin per unit for this period, computed as for the base period, was \$.01582, or \$.00228 more than the base-period margin.

Evidence that the tax was not borne by petitioner was as follows: Universal increases in the sale price of sugar were effected on the date of imposition of the processing tax in the amount of \$.55 per hundred pounds, to cover the amount of the tax. All of the accounts stated between petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses made through that broker, included the processing tax as a separate item and as an addition to the sale price of the article. "An account sale, typical of all such accounts, respecting the sale of sugar, made through its said broker" bore the notation, "Golden Ridge, 100 Pkts. 10,000# @3.71¢ \$371.00. F. O. B. Pltn. Tax Pd. Tax 0.526¢," \$.526 being the prevailing rate of processing tax at the time the particular account was rendered. A letter from the broker Rainold to petitioner, dated January 17, 1936, contained the following: "According to memorandum you furnished us on processing tax you paid on 298,017 pounds of sugar, and we have accounted to you for there [three] cars of 800 pockets and part car of 300 pockets and when we get paid for balance of this part car, or 500 pockets, it will total 3200 pockets or 320,000# on which the processing tax was included in the price. Therefore you have not paid anymore tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

On the foregoing facts the Board of Review found that "The extent to which the processing tax [was] paid and borne by the petitioner and not shifted to others in any manner whatsoever is \$3,655.82," and it awarded refund in that amount. This award was based, the Circuit Court of Appeals thought, "upon the theory that the claimant had established facts sufficient to invoke the statutory presumption that it had borne the burden of the tax" to that extent. In the view of the Court of Appeals, however, the evidence "clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

Our first question is whether the Board was entitled to base an award upon the statutory "prima facie evidence" or "presumption," or whether the Government's evidence removed the pre-

sumption from the case as a matter of law. For, although the Board did not state how it arrived at its award, it seems likely that it relied upon the prima facie evidence provisions and not upon a weighing of the evidence; petitioner does not assign error to the contrary, although it contends that the evidence supports the Board's award.

The statute, unfortunately, is beset by the ambiguity and the imprecision of definition which are not uncommon with respect to presumptions. But the difficulties of the subject will not excuse us from the duty to apply as best we may a statute Congress has seen fit to enact. At one point it speaks only of "prima facie evidence" and at another it refers to the prior section as creating a "presumption." "Prima facie evidence" alone might be taken to signify only a permissive inference, indicating that the Commissioner or the courts might, if they saw fit, permit a recovery solely on the basis of the margin evidence. See *Crane* v. *Morris*, 6 Pet. 598, 621; *Bailey* v. *Alabama*, 219 U. S. 219, 234; 9 Wigmore on Evidence (3d ed. 1940) § 2494. But the statute's later use of the word "presumption" and the careful detail with which the margin evidence and rebuttal evidence are described argue against such an interpretation, as does the legislative background. A committee report on Title VII, explaining the necessity for amending the existing refund provisions, stated: "It has been contended that while that section [§ 21(d) of the Agricultural Adjustment Act] states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund." Sen. Rep. 2156, 74th Cong., 2d Sess., p. 33. From this it seems clear that the new provision was meant to prescribe a minimum of proof which would require refund in the absence of opposing evidence. Therefore the inference arising from the margin evidence must be a compelled one.

The statute does not tell, however, on what event the existence of the presumed fact must cease to be assumed by the trier. Does the presumption cease to operate as soon as the Commissioner has met the burden of going forward with evidence to show shifting of the tax, or does it place on him the burden of proof? The Government and the court below, taking the former view, support it with the contention that "It is never the function of a rebuttable presumption to shift the burden of proof." *Commis-*

sioner v. *Bain Peanut Co.*, 134 F. 2d 853, 857. It is unnecessary for us to take so broad a ground, even if it is correct.[2] Dealing only with the particular presumption now before us, we find nothing to indicate that Congress attached exceptional probative value to the margin evidence, or that it desired for any other reason to tilt the scales sharply against the Commissioner rather than merely to even them somewhat in behalf of claimants. There is, for example, no reason to suppose that the Commissioner is better able than the processor to prove where the tax burden fell. On the other hand, the special problem here of preventing unjust enrichment, added to the usual strict examination of claims against the Government, convinces that Congress probably intended to leave the burden of proof on the claimant. Cf. *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386.

In the absence of any clearer statement in the statute, therefore, we think the presumption is given adequate effect if the burden is placed on the Commissioner of going forward with evidence sufficient to support a finding that the claimant did not absorb the tax. Once such evidence is presented, the presumption becomes inoperative and the issue is to be determined as if there had never been a presumption. The statute declares, however, that the presumption may be rebutted by proof of "the actual extent" to which the burden of the tax was shifted. This language appears to mean that the presumption may be rebutted pro tanto, and not necessarily all at once or not at all. Thus it does not cease to operate on introduction of evidence merely sufficient to support a finding that some of the tax was shifted. It must be evidence sufficient to support a finding that the entire tax was shifted. Short of that, the presumption is not eliminated but only diminished to the extent that the rebuttal evidence will support a contradictory finding. See *E. Regensburg & Sons* v. *Helvering*, 130 F. 2d 507, 509. When the margins are unfavorable to the taxpayer and favorable to the Commissioner, it is unnecessary, of course, to place a burden of going forward with

[2] But see, e. g., Morrison v. California, 291 U. S. 82, 88-91; Page v. Phelps, 108 Conn. 572; Weber v. Chicago, R. I. & Pac. R. Co., 175 Iowa 358; Bond v. St. Louis-San Francisco Ry. Co., 315 Mo. 987; Holzheimer v. Lit Brothers, 262 Pa. 150; Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 Harv. L. Rev. 59, 77-83, *Some Observations Concerning Presumptions* (1931) 44 Harv. L. Rev. 906; Bohlen, Studies in the Law of Torts (1926) 636, 637, 648-53; American Law Institute, Model Code of Evidence, Rule 703.

evidence on the claimant, for he has that burden anyway, as well as the burden of proof. Whether this means that the statute's language making the presumption operate in favor of the Commissioner is superfluous, or that in such a case the presumption must be given a different effect than when in favor of the claimant, we do not now decide. Cf. *E. Regensburg & Sons* v. *Helvering, supra.*

On the view we take of the statute, the proof introduced by the Commissioner made the presumption inoperative. We certainly could not say that, viewed by itself, the Commissioner's evidence would not permit a finding that petitioner shifted the entire burden of the tax. It tended to show that in all dealings with its broker the petitioner added the amount of the tax to the sale price and itemized it separately. That this was true as to all sales of molasses seems to be conceded. It was also true, or so it might be found, as to a substantial part of the sugar sales, and therefore inferentially as to all such sales. Petitioner raises some question as to the proper inference to be drawn from the sugar account and the broker's letter quoted above. But at least the broker's remarks that "the processing tax was included in the price" and "Therefore you have not paid any more tax than you collected" are unmistakable in their meaning. All of this evidence is among the kinds expressly mentioned by the statute as tending to rebut the presumption. More important, the statute appears specifically to provide that introduction of any evidence of this particular kind shall be sufficient to rebut the entire presumption. It states that the presumption may be rebutted by proof that the claimant modified sales contracts to reflect the initiation, termination, or change in amount of the tax, or "at any such time" changed the sale price of the article, or "at any time" billed the tax as a separate item, or indicated "by any writing" that the sale price included the amount of the tax. It then declares, "but the claimant may establish that such acts . . . do not represent his practice at other times." § 907(e)(2). This seems clearly to mean that when any examples of the named practices are proved, it may be inferred that they represent the uniform practice of the claimant and the burden becomes his to prove that they do not. Since the Commissioner proved that not only in a few cases but in a great number the tax was indicated in writing to be included in the sale price, we think there is no doubt that he fully rebutted the presumption within the meaning of the statute.

The second question is whether, with the presumption out of the case, there is evidence from which the Tax Court would be entitled to award a refund to petitioner in any amount. The court below, although it remanded the cause, apparently meant for it to be dismissed, for it said, "since there was no other proof to support any refund, the claim should have been disallowed in its entirety." Literally, of course, this cannot be true, for the margin evidence remained in the case for whatever it might be worth apart from the presumption. With this the Government agrees, and it concedes that, unless we can say that the evidence would not rationally support a finding in favor of petitioner, the case must go back to the Tax Court for decision on the evidence rather than on the presumption. We must determine whether there is evidence which is legally sufficient for administrative action, but we may not weigh it. *Dobson* v. *Commissioner*, 320 U. S. 489.

The fact that margins for the tax period are lower than those for the base period has some logical tendency to establish that the burden of the tax was borne by the processor. See *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 354. There are, to be sure, other and conflicting inferences which may also be drawn. As the margins are defined, the drop might be due to a decline in the demand for the processed goods, or to a decrease in the yield of the raw commodity, or to an increase in the price of the raw commodity. But we have no basis for saying that the margin thus defined does not tend to be comparatively stable and that a fall coincident with imposition of a tax would not more likely reflect the tax than a change in other factors. We suppose the taking of average margins over a base period has some tendency to produce that result. And the Tax Court's special experience might support such an inference. Cf. *Dobson* v. *Commissioner*, *supra*. Congress aparently believed that the rational connection was strong enough to justify basing a finding of absorption on the margin evidence alone. For, as we have seen, Congress intended that in a case where the margins were favorable to the claimant and no other evidence was introduced the claimant should be entitled to a refund, and there appears no reason of convenience or policy which would lead to such a rule in the absence of rational connection. For all these reasons we think a finding of absorption which was based solely on the margin comparisons would not be irrational.

Nor is the Commissioner's evidence so conclusive as to deprive the margin evidence of all significance. It permits but does not require a finding that petitioner had a uniform practice of billing the tax as a separate item. Even though such a practice be inferred, there is no evidence to show how far petitioner succeeded in its effort to pass the tax on, except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the effort to shift the tax. The fact may be that neither side's evidence goes very far toward demonstrating where the burden of the tax fell;[3] the inquiry is at best a difficult one. But we do not think it can be said that the record is devoid of rational support for a finding that petitioner absorbed some of the tax. Accordingly we must remand the case for a weighing of the evidence, including of course, such further evidence as the court may think it proper to receive in view of the way in which the case has been tried. In doing so we intimate no opinion, of course, as to whether petitioner has sustained the burden of proof placed upon it by the statute.

the Tax

Since the case must go back, it is necessary to pass upon a further question raised by petitioner. Petitioner, as we have noted, was not processing during the six months, February to July 1936, designated by the statute for computing margins after the tax period. For such a case the statute provides: "If during any part of such period the claimant was not in business . . . the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations." § 907(e). Contending that there were no similarly circumstanced concerns, petitioner sought to use the figures of a later period, that of its own 1936 production, in computing the base-period margins, which would have made those margins higher. We think the Board and the court below were correct in holding that the statutory method of making a prima facie case is exclusive and that the 1936 evidence might not be so used. The statute's restrictions, however, have reference only to the presumption;

[3] See Johnson, *AAA Refunds: A Study in Tax Incidence* (1937) 37 Col. L. Rev. 910.

they do not exclude other evidence generally relevant on the issue of whether the tax burden was shifted. The 1936 experience, though it could not help petitioner to create a favorable presumption, was entitled to be given whatever probative value it might independently have had and, subject to the usual principles of admissibility, was therefore admissible. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355-56.

The judgment below is modified and the cause is remanded to the Circuit Court of Appeals with directions to remand to the Tax Court for proceedings in conformity with this opinion.

Mr. Justice RUTLEDGE, dissenting.

I doubt that Congress intended to involve the award of refunds of processing taxes in the abstruse learning of "disappearing presumptions." In my opinion the terms "prima facie evidence" and "presumption" may be taken to have been used interchangeably in the statute. I think no more was intended than to authorize a finding in accordance with the margin evidence, if no other were presented; and in case opposing evidence should be offered, to allow inference either way according to the weight of the proof, taking into account the margin evidence. Hence, in this aspect of the case, I would rest on the decision of the Processing Tax Board of Review, which on the record reasonably may be considered to have been reached in this manner.

I also think the statute forbids going outside the base periods prescribed for comparative data. To hold otherwise would nullify the base period provisions of the Act, which I think are valid. The cause of action here rests on a waiver of the sovereign immunity to suit which Congress may make upon such conditions as it chooses. *Nichols* v. *United States*, 7 Wall. 122; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536; *Minnesota* v. *United States*, 305 U. S. 382, 388. Allowing in the evidence concerning other periods, though not for the purpose of computing margins, accomplishes indirectly what the base period provisions were designed to prohibit.

Accordingly, I think the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the decision of the Processing Tax Board of Review.

Mr. Justice BLACK concurs in these views.